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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD D. ELLENBERG as Trustee in Bankruptcy for Rodger and Rodger, Inc.,
Petitioner,

v.

T & B SCOTTDALE CONTRACTORS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I.

QUESTIONS PRESENTED

1. What is the correct test to apply in determining whether property is "property of the Estate" within the meaning of 11 U.S.C. Section 541 when the property is titled in a Debtor but a third party claims ownership of and title to the property?

2. Is property which is titled in the Debtor but is "meant for" or for "the benefit of" a third party, excluded from the "property of the Estate" within the meaning of 11 U.S.C. Section 541 when the claim of the third party is not sufficient to impose a trust upon the property?

3. If Party A contracts with Debtor to provide it with goods and services, which goods and services will be acquired by Debtor from Party B, and if Party A pays Debtor funds for the provision of such

goods and services with an expressed or implied understanding that Debtor will pay B, are those funds property of the Estate within the meaning of 11 U.S.C. Section 541 if a Bankruptcy case commences after Debtor receives the funds but prior to payment to B assuming that the facts do not give rise to the creation of a trust in favor of B?

4. If funds are excluded from the meaning of Property of the Estate within the meaning of 11 U.S.C. 541, may the Trustee-in-Bankruptcy assert the strong arm powers of 11 U.S.C. 544 to bring said funds into the Estate?

5. May the Trustee-in-Bankruptcy utilize its powers as the holder of a judicial lien upon the property of the Debtor under 11 U.S.C. 544 to recover for the Estate the funds paid to Debtor by

III.

Party A for providing it with goods and services, which funds were "meant by A" to be used by Debtor to pay a third party?

IV.

LIST OF PARTIES

The parties to the proceedings below were T&B Scottdale Contractors, Inc.; the United States of America (Internal Revenue Service); Richard D. Ellenberg, as Trustee in Bankruptcy for Rodger & Rodger, Inc. as an intervenor; and Trust Company Bank, as an intervenor. The respondent before this Court is T&B Scottdale Contractors, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD D. ELLENBERG as Trustee in Bankruptcy for Rodger and Rodger, Inc., Petitioner,

v.

T & B SCOTTDALE CONTRACTORS, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Richard D. Ellenberg as Trustee in Bankruptcy for Rodger and Rodger, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on April 5, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 866 F.2d 1372, and is reprinted in the appendix hereto, p. 1a, infra. The judgment and mandate was issued April 13, 1989, and is reprinted in the appendix as p. 30a, infra. The two decisions of the United States District Court for the Northern District of Georgia (O'Kelley, W.C.) which led to the opinion, have not been reported. They are reprinted in the appendix hereto, p. 32a, 38a, infra.

JURISDICTION

On October 6, 1983, the Internal Revenue Service filed a notice of levy on Trust Company Bank in an attempt to recover the allegedly delinquent withholding taxes of Rodger & Rodger, Inc., a depositor of the Bank. Approximately one week later T&B Scottdale Contractors, Inc. filed a Complaint in the United States District

Court for the Northern District of Georgia and asked the Court to enjoin enforcement of the levy. The Court granted the restraining order and directed that the funds be deposited into the registry of the court. On November 8, 1985, the Internal Revenue Service again levied on the R&R bank account and on November 17, 1983, R&R filed a Petition for Relief under Chapter 11 of the Bankruptcy Code. Subsequently, Richard D. Ellenberg, as Trustee in Bankruptcy for Rodger and Rodger, Inc., and Trust Company Bank sought to intervene in the District Court action and the Internal Revenue Service commenced an adversary action in the Bankruptcy Court.

The District Court consolidated the district court proceedings and the adversary action, granted the intervention motions, and directed the Bank to deposit the remaining funds in the registry of the court. The Bank, T&B and the Trustee filed

motions for summary judgment. On May 28, 1988, the court denied the Bank's and T&B's motions and granted the Trustee's ruling in the process that the monies in the account were part of R&R's bankruptcy estate.

T&B and the Bank filed a Notice of Appeal and the Eleventh Circuit, after oral argument, remanded the case to the District Court for clarification. That case is reported at 815 F.2d 1425. After entry of the District Court's revised order, T&B again filed a Notice of Appeal. On appeal, the Eleventh Circuit, in a 2-1 panel decision, reversed the District Court and remanded the matter to the District Court for further proceedings in accordance with the appellate court's opinion. See p. 30a, infra. Both the Trustee and Trust Company sought rehearing en banc which was denied. The denial is reported at 873 F.2d 300.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

11 U.S.C. 541

Property of the Estate:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the

petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such

mortgage or interest, becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

11 U.S.C. 544

Trustee as lien creditor and as successor to certain creditors and purchasers:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or

of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law

permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

STATEMENT OF THE CASE

T&B Scottdale Contractors, Inc., (hereinafter T&B) contracted with the City of Atlanta to construct a water treatment plant and was required, by the contract, to ensure adequate minority participation. As part of its fulfillment of the minority participation requirement, T&B entered into a subcontract with Rodger & Rodger, Inc.

(hereinafter R&R) to provide T&B with approximately Four Million Dollars ($4,000,000.00) worth of related services and materials. Subsequently, T&B and R&R entered into a Working Agreement which provided in pertinent part that:

> With respect to Item 3 above [the purchase of equipment], Contractor [T&B] shall purchase and pay for equipment in Subcontractor's [R&R] name in accordance with terms and conditions dictated by Contractor. Contractor shall open a bank account in Subcontractor's name for the sole purpose of paying for equipment covered by Item 3 above. Contractor shall maintain control of such bank account but account shall be set up joint signature by Contractor and Subcontractor.

While T&B submitted the subcontract to the City for review, it did not submit the Working Agreement out of concern that the City, if aware of the Working Agreement, might not approve the transaction as a bona fide minority subcontract. The importance of this fact is that the Working Agreement was truly secret since only T&B and R&R

were aware of the agreement and since T&B's interest in the account was neither recorded as a security interest nor set forth as a title interest nor otherwise disclosed of public record.[1]

T&B opened a checking account in the name of R&R at Trust Company Bank. The account card stated that all of the signatories were officers of R&R, when in fact two of the four signatories were officers of T&B. The account required a combination of two signatures on each check such that a valid check needed the signature of an officer of both R&R and T&B. Neither R&R nor T&B filed a financing statement or other public notice disclosing T&B's interest in the account.

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1. Petitioner asserted below that this secretness amounted to an illegal subterfuge to thwart the minority participation requirements which estops T&B from recovery. This issue, however, was not a ground upon which summary judgment was sought and is not an issue in this petition.

When R&R sought the protection of the Bankruptcy Court, the account balance was approximately One Hundred Thirty-Five Thousand Dollars ($135,000.00).[2] After the District Court consolidated a Bankruptcy Court adversary action with a complaint filed by T&B in District Court, Petitioner, as an intervenor, filed a Motion for Summary Judgment and asserted that the funds were property of the Bankruptcy Estate and that any interest asserted by T&B was at best a secret lien avoidable by the strong arm powers of the Trustee as a judicial lien holder under 11 U.S.C. Sections 541 and 544. In turn, T&B asserted that it owned the funds. The District Court entered summary judgment in

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2. The Internal Revenue Service levied upon the account and the funds were paid to the Clerk of the District Court pursuant to an Order providing that such payment would not alter the rights of the parties.

favor of Petitioner but the Eleventh Circuit Court of Appeals in a 2-1 decision reversed.[3]

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's opinion raises important issues, in conflict with this Court and other circuits, relating to common conflicts in bankruptcy proceedings. Specifically, the majority opinion greatly diminishes the Trustee's ability to assemble property for distribution to all creditors in accordance with the principle of equal distribution and the priorities set forth in the Bankruptcy Code 11 U.S.C. Section 726 by limiting the Trustee's power to avoid secret liens and by applying a novel analysis to the question of the

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3. Trust Company Bank asserted a secured claim to a portion of the funds and a claim of setoff. The Internal Revenue Service asserted a claim of lien based upon its levy on the account. The Internal Revenue Service informally recognized that its claim was a preference avoidable by the Trustee under 11 U.S.C. Section 547.

definition of property of the Estate. Under the majority opinion a claim of secret lien or interest is sufficient to allow one party to assert title to assets which otherwise would be part of the Bankruptcy Estate for the benefit of all creditors. Moreover, the opinion is contrary to this Court's well-established principle that secret liens are disfavored and will not prevail over the claims of a Trustee in bankruptcy. The majority opinion also conflicts with the recent decisions of three other Circuit Courts of Appeal which involve similar facts relating to the definition of property of the Estate and, further, the majority opinion ignores the decisions of the Eleventh Circuit and several lower courts with regard to the significant conflict between 11 U.S.C. Section 541 and 11 U.S.C. Section 544. The number of recent decisions on this matter

by the Circuit Courts of Appeal highlights the timely importance of the questions raised in the Petition.

I.

THE ELEVENTH CIRCUIT'S EXCLUSION OF "MEANT FOR" PROPERTY FROM A BANKRUPTCY ESTATE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Eleventh Circuit opinion questions prior interpretations of two Code Sections by expanding the types of property excluded from a bankruptcy estate and therefore not recoverable for distribution by the Trustee's strong-arm powers. This expansion occurs because the majority holds that property titled in a Debtor, but "meant for" a third party, is not property of the Estate and that the Trustee is foreclosed from asserting a lien to such property. The result of the expansion is a dramatic departure from prior rulings to the effect that property was excluded from the Estate only if it was held by the

Debtor in trust (or other similarly narrow categories of exceptions such as retainage claimed by a surety) and from prior rulings that under the strong arm powers a Trustee could avoid unperfected claims of title or a security interest except in narrow cases, such as funds held in trust or in which state laws would not permit a judgment lien creditor to prevail over those unrecorded interests of a third party.

A. The Eleventh Circuit's Analysis Was Flawed

The majority opinion correctly began its analysis by recognizing that the funds in the account were property of the Estate but then incorrectly held that this property interest was "subject to the interest of any person for whom the funds are beneficially held." (p. 13a, infra). In doing so, the majority opinion reached the crucial determination that the funds in the account were "meant for" R&R's

materialmen. (p. 15a, infra). Based on its determination that the funds were "meant for another," the majority concluded that the funds did not belong to the Bankruptcy Estate. (p. 16a, infra). Notably, the majority did not adopt T&B's arguments that the funds were held in a trust, or that T&B owned the funds, or that T&B was entitled to equitable title to the funds based upon surety principles. Rather, the majority held that the mere fact the funds were "meant for" another was sufficient to support its ruling, even though the persons for whom the funds were intended were not parties to the case. The majority then remanded the case for further proceedings, but stated in footnote 10 that the Estate was "foreclosed" from asserting a claim to the funds. (p. 21a, infra). Thus, the majority held that the secret Working Agreement, while not creating a trust, was sufficient to remove the funds

from the Estate and foreclosed the Trustee, without discussion, from asserting its powers (as a judgment lien creditor) to avoid secret interests.[4]

The dissent argues that the majority is incorrect in asserting that property held "for the benefit of another" is excluded from the property of the Estate, and argues that it is only property held "in trust" for the benefit of others which is excluded from property of the Estate. (p. 27a, infra). The dissent further suggests that a trust in favor of the third parties could not be established on the

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4. It is possible to argue that the majority only addressed the issue of title under Section 541 and that it simply did not reach the briefed and argued issue of the Trustee's power under Section 544. But considering the impact of the interplay of these two Code Sections on the outcome in this case, and the broad language of the footnote, such a reading of the case that will be difficult to sustain.

facts of this case if for no other reason than that they are not parties to the litigation.

B. The Majority Opinion Is Contrary To the Principles Set Forth By This Court

This Court has long held that "[t]he existence of secret liens is not in accord with the spirit of our commercial usage." The Lottawanna, 88 U.S. (21 Wall) 558, 582 (1874). See United States v. Speers, 382 U.S. 266, 275 (1965) (answering in the negative the question of "whether the Government, unlike other creditors, and contrary to the general policy against secret liens, should be given advantage of a lien which it has not recorded as of the date of bankruptcy.")

The Eleventh Circuit opinion allows a secret interest in property, an interest not recorded of public record, to prevail over the interest of the Trustee. The logic of the majority holding would lead to

a result contrary to that of United States v. Speers since, if in Speers the Internal Revenue Service had agreed with the Debtor that its assets would be used to pay the tax claim, then under the rationale of the Eleventh Circuit majority the funds would not have been property of the Estate. However, such a result would be inconsistent with this Court's reasoning in United States v. Speers.

C. The Majority Opinion Conflicts With Other Circuit Courts of Appeal

1. The Opinion Conflicts With the Fifth Circuit Opinion In Georgia-Pacific v. Sigma Serv. Corp.

The district court, the majority, and the dissent, all relied on Georgia-Pacific Corp. v. Sigma Serv. Corp., 712 F.2d 962 (5th Cir. 1983). The facts of Georgia-Pacific and this case are identical: both are bankruptcy - construction cases and in both the funds

were specifically "meant" to pay suppliers. In this case, the funds were placed in a checking account in the name of the subcontractor and required the signature of the contractor and the subcontractor. In Georgia-Pacific, checks were jointly payable to the supplier and the contractor. In Georgia-Pacific, the suppliers - the intended beneficiaries - were the plaintiffs seeking to impose a constructive trust upon the funds. In the instant case, the plaintiff was the contractor, who was obliged by contract to pay the funds to R&R, and whose interest was limited to avoiding the assertion of liens by third parties. In both cases, there was a written agreement between the party paying the funds and the Debtor receiving the funds. In Georgia-Pacific, the Debtor agreed to provide the invoice to the owner who would pay the same by check jointly payable to Debtor and Debtor's suppliers.

The specific purpose of the arrangement was to assure the owner that the suppliers would be paid and to assure the suppliers of prompt payment, yet the debtor had no express affirmative duty to endorse the check to the supplier.

In the instant case the agreement provided that an account would be opened in the Debtor's name for the sole purpose of paying for equipment pursuant to the contract between R&R and T&B. The contractor was to retain control of the account but the account required the signature of both the Debtor and the contractor. The Debtor had no affirmative obligation to sign checks or disburse monies as desired by the contractor. In Georgia-Pacific, the court found no constructive trust and held that the funds represented by checks payable to Debtor and a subcontractor were property of the Estate.

If anything, Georgia-Pacific provides a stronger case for the finding of a trust since the specific purpose of the agreement was to provide assurance to the suppliers. The checks identified the intended beneficiaries and the precise amounts each was to receive. Indeed, that case was brought by the intended beneficiaries. Yet, in Georgia-Pacific the Court ruled the funds were property of the Estate.

Why the different result here? The reason is the majority's dramatically different reading of the law. The majority stated, citing Georgia-Pacific, that "property held by debtor for the benefit of another would not become part of the bankruptcy estate." (p. 13a, infra). Georgia-Pacific in fact held that, since legal title was in the debtor, it was property of the estate subject to claims of equitable interests under 11 U.S.C. 541(d). Georgia-Pacific, 712 F.2d at 968. The

Georgia-Pacific Court analyzed the claim of equitable interest in light of the purpose of the strong arm powers of the Trustee and stated:

> However, we must preliminarily note that '[w]hen property of the estate is alleged to be held in trust, the burden rests upon the claimant to establish the original trust relationship.' [Collier on Bankruptcy 15th Ed.] Para. 541.13 at 541-67. This burden is based in part upon the statutory intent reflected by the sweeping marshaling and avoidance powers accorded a trustee in order to secure all the debtor's property for an equal distribution according to the terms of the Code. Id., Para.544.01.

Georgia-Pacific, 712 F.2d at 969.

The Georgia-Pacific Court then analyzed whether the Plaintiff had established facts requiring imposition of a constructive trust, or other equitable interest, upon the funds for the benefit of the Plaintiff. Finding the predicate facts to be lacking, the court held that the funds remained part of the Estate to be distributed to all creditors as provided by

law. In this case, the majority omitted the interim step of requiring that the plaintiff establish a trust relationship. The majority erred in not requiring the plaintiff to make the same strict showing in order to successfully assert an unrecorded claim to funds entitled to preference over other creditors. Moreover, the majority erred in holding that the funds are not property of the Estate absent a finding of trust or other equitable interest in favor of a party to the litigation.

The failure of the majority to limit the property excluded from property of the Estate to that held in trust, as opposed to that "meant for" others, is highlighted by the dissent which states:

> The majority also states that Georgia-Pacific stands for the proposition that property held by the Debtor for the benefit of another is not part of the bankrupt estate. This appears to be an incorrect reading of Georgia-Pacific.

> The statement upon which the majority relies comes for a passage in United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed. 515 (1983), that is quoted by the Georgia-Pacific Court. 721 F.2d at 967. The Whiting Court states that property of the Estate does not include 'property of others held by the Debtor in trust at the time of the filing of the petition.'

(p. 27a, infra).

Thus, the conflict is clearly drawn. The analysis has heretofore been whether or not there is an equitable claim of trust or otherwise to which the legal title of the Estate is subject. 11 U.S.C. 541(d). The Fifth Circuit's Georgia-Pacific analysis constrains the opened-ended scope of claims to title available under the majority opinion because the Fifth Circuit requires the claimant to attempt, as T&B unsuccessfully attempted, to assert such a trust or other recognized equitable claim to differentiate itself for the status of a general creditor.

2. The Opinion Conflicts With The Court of Appeals for the District of Columbia Circuit Opinion In In re Auto-Train Corp.

The Court of Appeals for the District of Columbia Circuit recently addressed a similar fact pattern in In re Auto-Train Corp., 810 F.2d 270 (D.C. Cir. 1987), a case involving the purchase of 100 railroad cars for approximately One Half Million Dollars. The purchaser ordered the cars from the Debtor, who in turn ordered them from the manufacturer. The Debtor was only intended to be a middleman in the transaction, though the contractual relationship was that the Debtor was the seller of the train cars to the Purchaser. The Debtor was paid for the cars and the Trustee asserted title to the funds against the manufacturer. The Court rejected the notion that the Debtor would be unjustly enriched by retaining the funds. The Court recognized that the Debtor had a legal

claim under the contract for the purchase price and therefore a right to the funds. Having the contractual claims to the funds, the Debtor would not be unjustly enriched by receipt of the funds. The Court then held that the Debtor did not receive the funds in trust and thus the funds were not excluded from property of the Estate. The Court stated that,

> [t]he requirements of a constructive trust in this setting may seem formalistic, but it is entirely appropriate to insist on their full rigor, since constructive trust doctrine creates a mechanism by which a creditor may attain a position roughly equivalent to a perfected security interest in proceeds without complying with the usual statutory formalities.

In Re Auto-Train Corp., 810 F.2d at 275.

Thus, the majority opinion is in direct conflict with both the Fifth Circuit and the District of Columbia Circuit Court of Appeals. The conflict is not only in result, but involves a difference of legal analysis of sweeping impact. That is, is

property not held in trust, but rather merely "meant for" another excluded form the meaning of property of the Estate?

3. The Opinion Is At Odds With Other Opinions of This Court, Other Circuits and District Courts

The Tenth Circuit has held that terminology in a lease that funds due the lessor from the sales of goods by the lessee were trust funds did not establish an equitable interest of a trust claim to the property of the Bankruptcy Estate because the agreement was designed to protect lessor from lessee's insolvency and did not impose or lead to the assumption of a fiduciary relationship. Carlson, Inc. v. Commercial Discount Corp., 382 F.2d 903, 905 (10th Cir. 1967).

A New York Bankruptcy Court held that, even accepting the undisputed testimony that a fiduciary relationship existed, a shipper could not impose a constructive

trust upon funds held by a trustee of a freight forwarder in the absence of overreaching, fraud, or unjust enrichment. "Imposition of constructive trust must include a consideration of the relative equities between the proposed trust beneficiary and the other creditors..." In Re Black & Geddes Inc., 35 Bankr. 830, 836 (Bankr. S.D.N.Y. 1984). The Court continued, "[a]pplication of constructive trust is not required by the principles of equity in the context of this Bankruptcy case and should not be used to relieve from the results of the conscious business judgment of an industry." Id.

Faced with similar facts, the court, in In Re Penn-Dixie Steel Corp., 6 Bankr. 817 (Bankr. S.D.N.Y. 1980), held that unless one clothed with a fiduciary duty obtains, by fraud, something that it would be inequitable to allow him to retain, that an equitable interest is not established

beyond that of a debtor-creditor relationship, and unless such a special set of circumstance occurs, the property belongs to the Bankruptcy Estate.

Indeed, this Court, in McKey v. Paradise, 299 U.S. 119 (1936) when faced with the claim of an employee organization asserting preferential status in a bankruptcy based upon the theory of a constructive trust because monies due the association had been segregated on the books of the debtor corporation, held that all that had occurred was the mere failure to pay a debt and the failure to pay a debt was not the equivalent of a trust.

In In Re Bass Mechanical Contractors, Inc., 84 Bankr. 1009 (Bankr. W.D. Ark. 1988) the subcontractors sought to have a constructive trust imposed against a trustee in bankruptcy as to funds paid by the owner to the contractor with which to pay the subcontractors. The Court held

that the failure to pay the funds would create damages and claims upon behalf of the owner and the subcontractors, but a breach of a contract to pay monies did not establish a trust claim to title.

Thus, traditionally only a very limited and carefully circumscribed set of equitable interests (which have not been and could not be established by T&B) have been found superior to the legal title coupled with the strong arm powers of the Trustee.

II.

THE ELEVENTH CIRCUIT'S DECISION THAT THE FUNDS ARE NOT PROPERTY OF THE BANKRUPTCY ESTATE RAISES IMPORTANT ISSUES FOR BANKRUPTCY CASES AND REQUIRES RESOLUTION BY THIS COURT

Trustees in Bankruptcy regularly avoid secret and unperfected interests in funds for the benefit of all creditors. However, in all such cases there is no question but that the property was "meant" for the creditor and under the majority opinion

below, such property would no longer be property of the Estate. Further, in every construction situation the person providing funds to a contractor or subcontractor intends, or hopes, that the contractor or subcontractor will pay all of its suppliers and materialmen. Thus, under the holding of this case, such funds will always be excluded from property of the Estate. If the test to exclude property from the Estate is that the creditor and the Debtor "meant for" the funds to be applied to a purpose, then in numerous situations creditors will assert claims to the Debtor's assets even though they do not hold perfected interests in those assets.

The majority opinion notably does not cite Section 11 U.S.C. 541(d) which provides that

> [p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest,... becomes property of the estate... only to the extent of the debtor's legal

> title to such property, but not to the extent of any equitable interest in such property the debtor does not hold.

In this case, the Debtor holds the sole legal interest in the property as the funds are titled in its name. The Debtor holds an equitable interest in the funds as the funds are monies it has earned under its contract with T&B. Thus, Section 541(d) codifies the traditional rule that monies held in a formal trust relationship are not property of the Estate. The majority has simply gone far past that point by holding that funds "meant for" another are not property of the Estate.

III.

THE ELEVENTH CIRCUIT'S OPINION UNDERMINES THE TRUSTEE'S STRONG-ARM POWERS AND CONFLICTS WITH THE RECENT NINTH CIRCUIT OPINION IN IN RE TLEEL

The issue of the Trustee's powers under Section 544 is the flip side of the question of what is excluded from the Section 541 definition of property of the

Estate, and the questions are best considered together. The issue is whether property that is excluded from the Estate may still be claimed by the Trustee pursuant to the strong-arm powers in Section 544. The broader the test for excluding property from the definition of property of the Estate, the more important this issue becomes. Specifically, if a mere secret or unrecorded lien or interest in property is sufficient to remove the property from the definition of property of the Estate, but the secret lien may be avoided by a hypothetical creditor in whose position the Trustee is placed under Section 544 such as a judgment lien creditor, may the Trustee claim the property for the Estate?

Historically, the strong arm power of the Trustee under 11 U.S.C. Section 544 and the ability to avoid a secret lien have

been powerful weapons in the Trustee's arsenal. In fact, as one Court held, the strong arm provision

> . . . is employed primarily to protect general creditors of the bankrupt against secret liens. To this end the trustee is given all the rights which a creditor with a lien by legal or equitable proceedings would enjoy. The trustee unquestionably enjoys the rights of a creditor who has levied attachment or execution on the bankrupt's property. More often than not it is such status which the trustee claims. This is because secret liens normally do not prevail over the lien of attachment or execution.

Sampsell v. Straub, 194 F.2d 228, 231 (9th Cir. 1951) (discussing Section 70 which was the predecessor of Section 544). The Fifth Circuit expressed a similar view:

> We believe that Borg-Warner misconceives the function of the trustee's strong-arm powers. They serve essentially to marshall all of the debtor's assets, including some the debtor itself could not recover, in order to enhance the resources available to the pool of creditors. . . . ('The basis of those avoiding powers is to protect the advantages of the bankruptcy's collective proceeding.') Exercise of the powers allows the estate to avoid,

> among other interests, secret or otherwise unperfected liens on property that the debtor appears to own....

Matter of Quality Holstein Leasing, 752 F.2d 1009, 1014 (5th Cir. 1985) (citations omitted)

The growing importance of resolving this issue is demonstrated in the detailed discussion of the conflict in In Re General Coffee Corp., 828 F.2d 699 (11th Cir. 1987) cert. den. ___ U.S. ___, 108 S.Ct. 1407 (1988). In this case the Eleventh Circuit avoided deciding the matter by finding that the funds were held in trust and that thus, they are not part of the Estate, and by finding that a judgment lien creditor could not claim funds held in trust by the Debtor. Thus, as to funds held by a Debtor in trust, the Trustee could not recover under either Code Section. The instant petition presents this conflict for decision. If the majority is correct and

the funds are not property of the Estate merely because they are "meant for" another case, the Trustee as a judgment lien creditor, could avoid the unrecorded, non trust, claims to title of T&B. See General Lithographing Co. v. Sight & Sound Projectors, Inc., 128 Ga. App. 304, 196 S.E.2d 479 (1973); In Re National Buy-Rite, Inc., 6 Bankr. 102 (Bkrtcy. N.D. Ga. 1980). The majority here, without reference to either General Coffee or the code sections, implicitly adopted the minority view that Section 544 powers do not reach property interests identified in 541 by holding that the Trustee was "foreclosed" from asserting an interest in the funds. See also Matter of Quality Holstein Leasing, 752 F.2d 1009, 1014, n. 10 (5th Cir. 1985); Matter of Plunkett, 89 Bankr. 776 (Bankr. E.D. Wis. 1988); In Re Executive Growth Investments, Inc., 40 Bankr. 417 (Bankr. C.D. Cal. 1984); Matter of Elin, 20 Bankr. 1012

(Bankr. D.N.J. 1982) aff'd mem. sub nom Elin v. Busche, 707 F.2d 1400 (3rd Cir. 1983).

The growing importance of the issue is further demonstrated in the recent Ninth Circuit opinion detailing the conflict between Sections 541 and 544 and resolving the conflict in a manner contrary to that of the Eleventh Circuit. On May 31, 1989, the Court of Appeals for the Ninth Circuit issued its opinion in In Re Tleel, ___ F.2d ___, 1989 WL 56243 (9th Cir. 1989). In Re Tleel involved a putative interest in real property and the equitable constructive trust doctrine. The Ninth Circuit affirmed the Bankruptcy Appellate Panel's ruling that the Trustee's Section 544 strong-arm powers permitted the Trustee to avoid the creditor's claim to title of the property in question. The panel asserted that even if the creditor held an equitable claim to the property which would be excluded from

the definition of property of the Estate under Section 541(d), that under state law a person in the hypothetical position of the Trustee is placed in pursuant to Section 544 could avoid the creditors interest and thus the Trustee could avoid that interest and recover the property for teh Bankruptcy Estate. In Re Tleel, 1989 WL 56243 at pp. 3-4. The court stated, "[w]e necessarily act very cautiously in exercising such a relatively undefined equitable power in favor of one group of potential creditors at the expense of other creditors for ratable distribution among all creditors is one of the strongest policies behind the bankruptcy laws." Id. at p. 6.

The very caution which is apparent in the Ninth Circuit's analysis is wholly lacking in the Eleventh Circuit's analysis.

On the question of the interplay between 11 U.S.C. Section 541 and 11 U.S.C. Section 544, the Ninth Circuit approach is helpful:

> Even conceding that the property rights of the estate are derivative from the property rights of the debtor, still the trustee enjoys additional powers quite independent of his powers under Section 541, and in no way derivative from the debtor's rights at state law. Failure to consider section 544 together with section 541 may lead to misleading generalizations and sometimes to unsound results. (citations omitted).
> (3) Chbat's contention that under section 541(d) all beneficial or equitable owners of property may exempt their property from the debtor's estate in all circumstances, notwithstanding the debtor's legal title and the avoidance powers of Section 544, goes too far. This interpretation would open the door to allegations of secret deals resulting in constructive trusts and thereby shelter some unsecured claims from avoidance. This result was not intended by the Bankruptcy Code and is contrary to the policy goal of ratable distribution among creditors. On the other hand, it is not necessary for us to go as far as the BAP, which held that section 541(d) applies only to those beneficial owners whose interests cannot be otherwise avoided under section 544. A fair reading of the statutes in this context mandates

> only that section 544(a)(3) prevail in this and similar instances. Chbat's asserted constructive trust clearly represents the kind of inchoate claim that section 544(a)(3) was designed to cut off.

In Re Tleel, 1989 WL 56243 at pp. 10-11. Had the Eleventh Circuit simply discussed the 541-544 interaction, it might well have reached a different, and more correct, result.

This Petition is not the place to argue the merits of this statutory conflict, but it is the place to note the importance of the conflict as evidenced by the number of recent decisions addressing the matter and as evidenced by the substantial erosion in the protection from secret liens which occurs under the majority opinion by removing from the Estate property subject to recovery by a judgment lien creditor and then foreclosing the Estate from asserting its strong arm powers.

Indeed, it is difficult to fathom a hypothetical situation in which the Trustee would assert its strong arm powers in which the property was not "meant for" a third party. One could be dealing with an unrecorded security interest, but in such a case the Debtor (absent fraud) meant for the creditor to have such an interest, even if the creditor meant, as in this case, to keep that interest secret. One could be dealing with property titled in Debtor but which Debtor "meant for" a family member. "Meant for" is such a broad test that if property was excluded from the definition of property of the Estate on the basis of such a test and the Trustee is foreclosed from asserting an interest therein under Section 544, then Section 544 powers would rarely, if ever, be successfully asserted to bring property into the Estate to be equally distributed to all creditors.

CONCLUSION

This Petition presents the question upon which the Circuits are divided as to the appropriate criteria for determining what is property of the Estate and presents the statutory conflict between that definition and the Trustee's strong-arm powers.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

T & B SCOTTDALE CONTRACTORS, INC.
PLAINTIFF-APPELLANT,

V.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE,

RICHARD D. ELLENBERG, Trustee
for Rodger & Rodger, Inc.,
Trust Company Bank,
Intervenors-Defendants-Appellees

No. 88-8088

March 2, 1989

JOHNSON, Circuit Judge

This appeal arises from the district court's clarification upon remand of a previous order. In denying the summary judgment motions of T & B Scottdale Contractors, Inc., and Trust Company Bank and granting the motion of the trustee in bankruptcy of Rodger & Rodger, Inc., the court declared certain funds part of Rodger & Rodger's estate in bankruptcy. We reverse and remand.

I. FACTS

We summarize the facts more fully set forth in this Court's opinion in T & B Scottdale Contractors, Inc. v. United States, 815 F.2d 1425 (11th Cir. 1987). In 1982, the City of Atlanta hired T & B Scottdale, Inc. ("T & B") to complete a water treatment project. The contract provided that T & B's minority subcontractors would be able to purchase materials through joint checking accounts controlled by T & B.[1] Rodger & Rodger, Inc. ("R & R"), a minority subcontractor hired to complete the mechanical portion of the project, entered into a contract with T & B that provided:

> With respect to Item 3 above, Contractor shall purchase and pay for equipment in Subcontractor's name in accordance with terms and conditions dictated by Contractor. Contractor shall open a bank account

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1. Under-capitalized minority subcontractors often have problems obtaining surety bonds. The use of joint checking accounts made surety bonding unnecessary.

> in Subcontractor's name for the sole purpose of paying for equipment covered by Item 3 above. Contractor shall maintain control of such bank account, but account shall be set up joint signature by Contractor and Subcontractor.

T & B established the account as required by the contract at Trust Company Bank ("TCB" or "the Bank").

Through late 1983, the account functioned as anticipated. R & R would send T & B its unpaid invoices for materials. T & B would then deposit money into the account and write a check to R & R's vendor.[2] The check would be sent to R & R for signature and then forwarded to the vendor.[3] Only T & B ever deposited funds in the account. The account statements were sent to T & B. No funds were ever disbursed to R & R.

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2. The balance in the account was usually zero because T & B would deposit only enough to cover a specific invoice.

3. The account card required the signature of agents of both T & B and R & R.

On September 23 and October 4, 1983, T & B deposited a total of $135,264.89 in the joint account. On October 7, in response to R & R's failure to pay its back taxes, the IRS served notice of levy on the account. T & B filed a wrongful levy action against the government on October 14. Although the district court did not preliminarily enjoin the IRS levy, it did order $92,008.48 (the amount subject the levy) to be deposited in the court registry. On November 17, the IRS served notice of an additional levy of $44,909.45. The court ordered the remainder of the funds be placed in the registry "as soon as practicable." R & R filed for bankruptcy on the same day. The bank, fearful of running afoul of the automatic stay provisions of the bankruptcy, delayed the deposit of the final $43,256.41. This last

portion of the funds was eventually deposited with the district court early in 1985.

The bank, which sought $89,256 allegedly owed it by R & R on a defaulted loan, and the trustee in bankruptcy intervened several weeks later in the wrongful levy action. T & B and the bank moved for summary judgment, each claiming title to the money. The trustee moved for summary judgment on the basis that the money was part of the bankruptcy estate. The district court rejected the arguments of the bank and T & B and granted summary judgment to the trustee, remanding the case to the bankruptcy court "for its determination of the parties' interests, and distribution of the estate's assets." The bank and T & B then brought their first appeals.

On appeal, this Court did not reach the merits of the case due to the district court's somewhat uncertain holding regarding the nature of T & B's claims. We could not conclude we had jurisdiction to decide the merits because the trial court's order was unclear as to whether all of T & B's arguments regarding its ownership of the funds had been completely rejected. We held that if T & B could still argue to the bankruptcy court that the funds were really its own, then the district court's order was not final and appealable. We indicated that if T & B's arguments had been foreclosed, then the order would probably be considered final and appealable. 815 F.2d at 1428. We remanded to the district court for clarification. On remand, the district court explained without equivocation that it had completely rejected T & B's claims of ownership of the funds.[4]

II. DISCUSSION

A. Jurisdiction

We may now squarely address the question of jurisdiction. The answer turns on whether the district court's decision constitutes a final and appealable order which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." In Re TCL Investors, 775 F.2d 1516, 1519 (11th Cir. 1985) (order directing the bankruptcy court to conduct a trial on the merits of a property claim held not a final order); see also In Re Miscott Corp., 848 F.2d 1190, 1192-93 (11th Cir. 1988) (order resolving contract dispute but remanding to factual development of attorney's fees issue held

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4. However, it did not enter a final judgment under Fed. R. Civ. P. 54 against T & B, presumably because, if T & B had other unrelated claims to bring as a secured creditor against R & R's estate, it should be allowed to do so before the bankruptcy court.

not final); In Re Regency Woods Apts., 686 F.2d 899, 901 (11th Cir. 1982) (order finding creditors were not adequately protected and remanding to establish monetary terms of required protection held not a final order). See 28 U.S.C.A. Section 158(d) (Supp. 1988) (court of appeals has jurisdiction to hear appeals from final order entered by district court in bankruptcy case).

The clarified order of the district court is a final order. The issue the district court addressed was whether the money was part of the bankruptcy estate of R & R. The district court held that it was. There is nothing left of T & B's claims that the money is not part of the bankruptcy estate. This decision is final and ended the litigation on the merits.[5]

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5. We suggested in our previous opinion that:

> if the litigation in question is viewed as the discrete controversy between T & B Scottdale and the

The Seventh Circuit recently decided that a district court's decision that disputed assets are part of the bankruptcy estate is a final and appealable order. In Re Joliet-Will Cty. Comm. Action Agy., 847 F.2d 430, 431 (7th Cir. 1988). In Joliet-Will, the United States and state agencies argued before the district court that certain funds they had granted to the debtor should not be considered part of the debtor's bankruptcy estate. The district court held that the funds were part of the

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> trustee of whether the account should be included in the bankruptcy estate, the district court had indeed ruled on the merits, leaving only a judgment to be executed.

815 F.2d at 1428. The controversy between the trustee and T & B is a discrete one, although it certainly has implications for other parties. If the money were not part of R & R's estate in bankruptcy, then TCB, the trustee, and the United States could make no claims against the money in the bankruptcy proceeding. The crucial threshold decision made by the district court was whether R & R's estate or T & B owned the money. Other claims could be addressed only after that determination had been made.

estate. The Seventh Circuit held, as we now do, that a district court's decision to include funds in a bankrupt's estate was final and appealable. See also In Re Woodson Co., 813 F.2d 266, 270 (9th Cir. 1987) (determination that certain interests were not part of the bankruptcy estate held to be a final order).

The holdings of In Re Regency Apts., In Re TCL Investors, and In Re Miscott, supra, are not to the contrary. They emphasize that an order is not final if on remand the bankruptcy court must exercise "significant judicial activity involving considerable discretion." Miscott, 848 F.2d at 1192. Such "activity," however, must be related to the order entered by the district court. The United States argues that the bankruptcy court's eventual division of the estate will constitute such "activity." This argument misses the point. The bankruptcy court certainly has

more work to do in overseeing the administration of the R & R estate. The relevant question is whether the bankruptcy court can exercise any discretion in implementing the district court's order. It cannot. The district court's decision that the funds belong in the bankruptcy estate leaves nothing for the bankruptcy court to do except begin the everyday [sic] steps of the bankruptcy adjudication process.[6] See Matter of Fox, 762 F.2d 54, 55 (7th Cir. 1985) ("'[F]inal' does not mean the same thing in bankruptcy as in other federal cases. A proceeding to

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6. The United States also argues that when an order is final as to only one party, it is not appealable unless final judgment is entered against the party. See Fed. R. Civ. P. 54(b). The district court did not enter a Rule 54(b) judgment against T & B. Although the United States correctly states the law, that law does not apply in this case. The decision that the funds are part of the estate is final as to all parties. That issue may not be relitigated, although other questions concerning the actual division of the estate will be decided later by the bankruptcy court.

establish a claim against a bankrupt estate is final for the purposes of appeal when it is over and done with, even though the bankruptcy goes on.")[7]

B. Merits

1. Summary Judgment Motion of the Trustee

The district court held that the funds that had been deposited in the joint account at TCB were part of the bankruptcy estate. A debtor's estate in bankruptcy consists of "all legal and equitable interests of the debtor in property as of

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7. Not only is the order final, but it is also appealable. In In re Regency, this Court held that for a collateral bankruptcy order to be reviewable: it must (1) be independent and easily separable from the substance of other claims in the action; (2) present a need to secure prompt review in order to protect important interests of any party; and (3) be examined in light of practical, rather than narrowly technical considerations.
686 F.2d at 902. The court's order meets these criteria. It is easily separable, and is most efficiently reviewed before the funds in controversy are distributed to creditors in the bankruptcy proceedings.

the commencement of the case." 11 U.S.C.A. section 541(a)(1) (1979) (emphasis added). The extent and validity of the debtor's interest in property is a question of state law. See In re Livingston, 804 F.2d 1219, 1221 (11th cir. 1986). Under Georgia law, "[d]eposits in a bank to the credit of a debtor become property of the estate under section 541(a)(1)", see King, 4 Collier on Bankruptcy Para. 514.11 at 541-71 (15th Ed. 1979) ("Collier"), accord In Re Williams, 61 B.R. 567, 570 (Bankr. N.D. Tex. 1986), subject to the interest of any party for whom the funds may be beneficially held. Collier at 541-72 and 73; Georgia Pacific Corp. v. Sigma Serv. Corp., 712 F.2d 962 (5th Cir. 1983) (property held by debtor for the benefit of another would not become part of the bankruptcy estate). The legislative history of 11 U.S.C.A. section 541 makes it clear that funds in the

debtor's possession held for a third-party do not become part of the estate in bankruptcy:

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 368 (1977); Sen.Rep. No. 989, 95th Cong., 2d Sess., 82, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5868, 6324. See also Collier, para. 541.01 at 514-7; cf. Georgia-Pacific, 712 F.2d at 967, 971-72 (checks in debtor's possession made payable jointly to claimant and debtor held part of debtor's estate because no clear bilateral agreement stated that the checks belonged to claimant).

It is undisputed that the funds deposited by T & B in the account were meant for R & R's materialmen. T & B's contract with R & R and with the City of Atlanta expressly stated the funds were to be used to pay the materialmen. Like the hypothetical debtor holding funds meant to pay his physician described in the legislative history cited above, R & R was holding funds meant to pay its materialmen. In neither situation do the funds belong to the bankruptcy estate.[8] The trustee argues that Georgia-Pacific, supra, is to the contrary. Although the Georgia-Pacific court found that checks held by the debtor made out jointly to materialmen and the debtor were part of the debtor's estate,

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8. It should be noted that $92,008.48 of the funds were not even in the joint account at the time R & R declared bankruptcy. R & R had neither possession of, nor control over, nor any equitable interest in those funds in the registry of the court at the time of the commencement of the bankruptcy case.

the case actually supports our holding. The court recognized that property held by the debtor for the benefit of another was not part of the bankruptcy estate. Id., 712 F.2d at 967. The court rejected the materialmen's claim based on lack of evidence of a mutual agreement to give the proceeds of the checks to the materialmen. Id. at 971-72. As noted above, in this case it is undisputed that the parties agreed that the funs were meant solely for the materialmen. The district court erred in holding that the funds belonged in the estate merely because they had been located in an account bearing R & R's name.

Finally, TCB argues that under Georgia law it had a right to set off the funds in the account to satisfy a loan on which R & R had defaulted. See Cotton States Mut. Ins. Co. v. Citizens and Southern Nat. Bank, 168 Ga.App. 83, 308 S.E.2d 199, 203 (1983) (funds in general deposit accounts

"are subject to set-off against any matured indebtedness for which the bank is creditor to the principal"); Simpson v. Georgia State Bank, 159 Ga.App. 310, 283 S.E.2d 278, 280-81 (1981) (funds in a special account may be set off to satisfy the debt of a party with no beneficial interest in the account if an express agreement so provides). At one point in time TCB may have had the right to set off the funds; however, because it did not assert its rights in a timely fashion, it was foreclosed from doing so. See Prudential-Bache Securities, Inc. v. Bartow County Bank, 187 Ga.App. 530, 370 S.E.2d 751, 754 (1988).

In Prudential-Bache, a judgment creditor attempted to garnish funds held by the debtor's bank. The court held that once the funds, in this case a certificate of deposit, had been used to offset a deficiency on a defaulted loan, the

judgment creditor could not garnish the funds. However, the court noted that interest collected on the deposit certificate had never been applied to the defaulted loan. The court held that although the bank could have offset the interest money before the garnishment action was filed, it was foreclosed from exercising its set-off rights after the claim was made. 370 S.E.2d at 754. The bank's request to offset the funds after the claim was filed came too late.

In the present case, both the United States and T & B asserted claims in federal court against the money long before TCB attempted to exercise its rights. The IRS filed its notices of levy on September 23 and October 4, 1983. T & B brought the wrongful levy action on October 4. By November 17, all of the funds had been ordered deposited in the district court registry. The bank did not try to exercise

its set-off rights until its motion to intervene on November 30. Under Prudential-Bache, the bank's chance at the funds had long since passed.[9]

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9. When a bank has a contractual lien on a certificate of deposit, the result may be different. Id., 370 S.E.2d at 754. Under Georgia law, a bank may expand its rights beyond that provided by common law set-off by contracting with the certificate holder to create a lien. See id. at 753; Spurlock v. Commercial Banking Co., 138 Ga.App. 892, 227 S.E.2d 790, 793 (1976), aff'd 238 Ga. 123, 231 S.E.2d 748 (1977). If such a contractual lien exists, the bank need not win any sort of race to the money represented by the certificate of deposit.

In this case the bank claims that such an express contract exists. The joint account signature card states:

> Bank may, at any time and without prior notice, charge the account for any indebtedness to the Bank, whether or not matured, if the Bank believes its ability to collect the debt is in any way in jeopardy.

This clause does not create a lien on the account. It does not purport to give the bank rights typically associated with that of a lienholder. It does not use the term lien or security interest. It merely gives written expression to the bank's pre-existing set-off rights under Georgia common law, and adds the single expansion of encompassing unmatured debts. See Design Spectrum, Inc. v. First Nat. Bank of Atlanta, 182 Ga.App. 418, 355 S.E.2d 733, 734 (1987) (although common law set-off applies only to matured debts, parties may

2. Summary Judgment Motions of T & B and TCB

The district court restricted itself to determining whether or not the funds comprised part of the bankruptcy estate. It stated, "If the account is not within R & R's estate, the court would retain the action to determine the efficacy of T & B's and TCB's claims. In the latter scenario, fact issues would be involved and summary judgment would not be appropriate." Since the district court has not passed upon the merits of T & B's and TCB's claims against the funds (except to hold that their claims

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include unmatured debts by contract). Finally, it is questionable whether a bank could even have a lien on money held in a general deposit account. Compare Phillips & Jacobs, Inc. v. Color-Art, Inc., 533 F.Supp. 14, 16 (N.D. Ga. 1982) (bank has title to funds in general deposit accounts) with Stephens v. Clark, 154 Ga.App. 306, 268 S.E.2d 361, 363 (1980) ("As a general rule, a party cannot hold a lien on his own property.").

were inferior to that of the R & R estate), we will not decide their summary judgment motions.[10] See Osborne v. Folmar, 735 F.2d 1316, 1318 (11th Cir. 1984) (remaining issue not considered by the district court). We therefore remand the case for the district court to determine to whom the funds in the registry should be disbursed.

For the foregoing reasons, the order of the district court is REVERSED and REMANDED.

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10. However, some of the findings necessarily made by this Court in the course of its decision in this case will be relevant upon remand. Obviously, R & R's estate is foreclosed from making a claim upon the funds, and TCB's claim of a right to set-off or lien has been rejected. Most importantly, this Court has found that the funds placed in the registry were meant to pay R & R's materialmen. Those materialmen or a party succeeding to their interests would appear to have a strong claim to the funds. See Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136 & n. 12. 83 S.Ct. 232, 234 & 35 & n. 12, 9 L.Ed.2d 190 (1962).

HATCHETT, Circuit Judge, dissenting.

I would hold that the disputed funds became property of Roger & Roger's [sic] (R & R) bankruptcy estate pursuant to 11 U.S.C.A. section 541 (West 1979 & Supp. 1988).

The district court, relying on Georgia Pacific Corp. v. Sigma Service Corp., 712 F.2d 962 (5th Cir 1983), held that the disputed funds belong to the estate. T & B Scottdale Contractors v. United States No. C-83-2253-A (N.D.Ga. May 28, 1985) at 8, 10. The majority relies on Georgia Pacific Corp. v. Sigma Services Corp., but concludes that the funds do not belong to the estate. Consequently, the majority or the district court misreads the case.

A. Section 541

A bankruptcy estate consists of "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C.A. section 541(a)(1). If

the debtor holds property in trust for another, however, the property does not become part of the estate. The following example, in section 541's legislative history and quoted by the majority, illustrates this principle.

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 368 (1977); Sen.Rep. No. 989, 95th Cong., 2d Sess. 82, reprinted in 1978 U.S. Code Cong. & Admin. News 5868, 6324 (quoted in Collier on Bankruptcy, para. 541.01 at 541; Georgia Pacific, 712 F.2d at 967 n. 4; Majority Opinion, slip op. at 1607, at ____).

The majority compares the hypothetical debtor and physician to R & R and R & R's materialmen and concludes the "[i]n neither situation do the funds belong to the bankrupt estate." Majority Opinion, slip op. at 1608, at ____. According to the opinion, the Georgia Pacific court recognized that all property held by a debtor for the benefit of another is not part of the debtor's bankruptcy estate. This conclusion, however, appears to mischaracterize the rule set forth in Georgia Pacific.

B. Case Law

1. Georgia Pacific: Are the Facts Distinguishable?

In Georgia Pacific, Sigma, a general contractor, began a project for Georgia Pacific. Sigma asked Georgia Pacific to send it checks drawn to the order of both Sigma and its materialmen. 712 F.2d at 964. Sigma filed for bankruptcy under Chapter 11

while in possession of these checks. The materialmen argued that funds from the checks belonged to them, rather than to Sigma's bankruptcy estate. 712 F.2d at 964-65. The court, however, held that the funds belonged to the estate. 712 F.2d at 964, 972. The court focused on the fact that Georgia Pacific's agreement to draw jointly-payable checks placed "no affirmative duties upon Sigma in relation to the suppliers." 712 F.2d at 971-72.

The majority distinguishes T & B from Georgia Pacific by concluding that the T & B agreement placed affirmative duties on R & R in relation to its materialmen. "[I]n this case [unlike in Georgia Pacific] it is undisputed that the parties agreed that the funds were meant solely for the materialmen." Majority Opinion, slip op., at 1608, at ____.

It is difficult to support the majority's distinction given the factual similarity between T & B and Georgia Pacific. For example, in Georgia Pacific, Georgia Pacific agreed to write checks to Sigma. In T & B, T & B Scottdale (T & B) agreed to deposit funds into a R & R account. In Georgia Pacific, Georgia Pacific contemplated that Sigma would use funds from the checks to pay materialmen. In T & B, T & B contemplated that R & R would use funds from the account to pay materialmen. In neither case were the materialmen parties to the agreement. It is difficult to conclude that the T & B agreement imposed affirmative duties on R & R, when the Georgia Pacific agreement did not impose affirmative duties on Sigma.

2. Georgia Pacific: Is Reliance On The Whiting Quote Proper?

The majority also states that Georgia Pacific stands for the proposition that property held by the debtor for the benefit of another is not part of the bankruptcy estate. This appears to be an incorrect reading of Georgia Pacific.

The statement upon which the majority relies comes from a passage in United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983), that is quoted by the Georgia Pacific court. 721 F.2d at 967. The Whiting Court stated that property of the estate does not include "property of others held by the debtor in trust at the time of the filing of the petition." 103 S.Ct. at 2315 n. 10 (citing legislative history to 11 U.S.C.A. section 541) (emphasis added). The T & B district court did not find the existence of a trust in favor of any party. The majority evidently finds a trust for the benefit of the materialmen. This the

majority cannot do because the burden of establishing a trust relationship on the party claiming the benefit of such a relationship. Georgia Pacific, 712 F.2d at 969 (citing Collier on Bankruptcy, para. 541.13 at 541-67). The materialmen are not parties to this litigation; consequently, no trust for their benefit can be created.

Further, the majority is incorrect in suggesting that either the Georgia Pacific court or the Whiting Court created a rule excluding all property held for the benefit of another from property of the estate. This is apparent from Georgia Pacific's holding: Georgia Pacific's checks, held by Sigma for the benefit of materialmen, became property of the estate. Likewise, T & B's deposits, held by R & R for the benefit of its materialmen should become part of R & R's bankruptcy estate.

C. Conclusion

No Supreme Court or Eleventh Circuit decisions exist that control this case. The court in Georgia Pacific Corp. v. Sigma Service Corp., 712 F.2d 962 (5th Cir. 1983), however, held that disputed funds similar to those in T & B belong to a bankruptcy estate. In addition, the funds in T & B came from an account named "Roger & Roger". [Sic] All persons who signed the account signature card identified themselves as R & R officials. R & R co-signed all checks from the account. The account, therefore, constituted a legal interest of R & R.

Accordingly, when R & R filed for bankruptcy, the funds in the account became property of the estate pursuant to 11 U.S.C.A. section 541. The materialmen, like other creditors, may pursue their claims against R & R in accordance with bankruptcy procedures.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-8088

D.C. Docket No. 1:83-2253

T & B SCOTTDALE CONTRACTORS, INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee,

RICHARD D. ELLENBERG, Trustee
for Rodger & Rodger, Inc.,
TRUST COMPANY BANK,

Intervenors-Defendants
Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before JOHNSON, HATCHETT and COX, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that intervenors-defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

HATCHETT, Circuit Judge, dissented and filed an opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

T & B SCOTTDALE CONTRACTORS, INC.

VERSUS

UNITED STATES OF AMERICA, TRUST COMPANY BANK, and RODGER & RODGER, INC.

1:83-cv-2253-WCO

IN RE: RODGER & RODGER, INC.,
Debtor

UNITED STATES OF AMERICA
Plaintiff

VERSUS

RODGER & RODGER, INC., T & B SCOTTDALE CONTRACTORS, INC., TRUST COMPANY BANK,
Defendants

ORDER

This case was remanded by the Eleventh Circuit Court of Appeals for clarification of this court's order of May 28, 1985. T & B Scottdale Contractors, Inc., v. U.S., 815 F.2d 1425 (11th cir. 1987). Specifically,

the Eleventh Circuit remanded the case "so that the district court may clarify to what extent T & B Scottdale can pursue its claims in bankruptcy court." Id. at 1426. Also before the court is the motion of defendant Trust Company Bank ("TCB") for entry of judgment against T & B Scottdale Contractors, Inc. ("T&B"). The court heard oral argument on this motion in chambers on November 23, 1987. After careful consideration of the record, briefs, and arguments of counsel, and for the reasons set forth below, the court denies the motion, clarifies its order of May 28, 1985 by reemphasizing that its previous order foreclosed only T&B's argument and theories supporting its claim of ownership of the bank account, and refers the case to the bankruptcy court for proceedings consistent with this order.

This case is a dispute over the ownership of funds in a bank account opened by T&B in the name of its subcontractor, Rodger & Rodger, Inc. ("R&R"). On May 28, 1985, this court granted summary judgment in favor of R&R, ruling that the funds in the account were part of the bankruptcy estate. In so ruling, the court specifically rejected T&B's arguments that it "owned" or had "legal title" to the account. T & B Scottdale Contractors, Inc. v. U.S., No. 83-2253 at 5 & 10 (N.D.Ga. 1985) (order granting summary judgment). The resolution of the issue of ownership was necessary for a determination of whether the funds at issue were are [Sic] part of the bankruptcy estate. As this court explained in that order,

> [t]he ultimate question in this action is whether the account is within R&R's estate. If it is, the funds should be turned over to the Trustee and the matter returned to the bankruptcy court which is uniquely qualified to determine the money's distribution. If the account is not within R&R's

> estate, the court would retain the action to determine the efficacy of T&B's and TCB's claims.

Id. at 5.

After rejecting all of T&B's theories supporting its claim of ownership of the account, the court expressly declined to rule on the issue of whether T&B may have other interests in the account in bankruptcy. Id. at 10. The court now reemphasizes that its previous order did not foreclose any of T&B's other rights as a creditor in bankruptcy; the bankruptcy court will determine whether such claims, if any, are valid. The bankruptcy court, of course, is bound by this court's rejection of T&B's theories of ownership of the funds (i.e., constructive trust, surety and equitable subordination). T&B, therefore, may not reassert these arguments before that court, nor may it reargue the issue of whether the funds are part of the bankruptcy estate.

TCB has moved for entry of a final judgment against T&B.[11] The court denies this motion for two reason. First, as indicated above, T&B may have some other claims against the bankruptcy estate, and these claims, if any, survived the summary judgment order. Second, while the court may certify as a final judgment its ruling that T&B has no ownership interest in the account, it is of the opinion that such an entry of final judgment at this stage would hinder the expeditious administration of the bankruptcy estate. Fed. R. Civ. P. 54(b).

Accordingly, the court denies the motion for entry of a final judgment, clarifies its order of May 28, 1985 by reemphasizing that its previous order

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11. The Eleventh Circuit suggested that the court certify the previous order as a final judgment under Rule 54(b) if this court determines that T&B's claims against the account were foreclosed by that order. T & B Scottdale, 815 F.2d at 1426.

foreclosed only T & B's arguments and theories supporting its claim of ownership of the account, and refers the case to the bankruptcy court for proceedings consistent with this order. As the funds in the account have already been delivered to the Trustee from the registry of the court, the court need not enter an order to that effect.

IT IS SO ORDERED this 9th day of January, 1988.

/s/_____
WILLIAM C. O'KELLEY
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

T & B SCOTTDALE CONTRACTORS, INC.

VERSUS CIVIL ACTION 1C-83-2253-A

UNITED STATES OF AMERICA, TRUST COMPANY BANK, and RODGER & RODGER, INC.

IN RE: RODGER & RODGER, INC.

Debtor

UNITED STATES OF AMERICA

Plaintiff

VERSUS

RODGER & RODGER, INC., T & B SCOTTDALE CONTRACTORS, INC., TRUST COMPANY BANK,

Defendants

ORDER

Presently pending for consideration are the motions of plaintiff T & B Scottdale Contractors, Inc., (T&B) for summary judgment, of intervenor Trust Company Bank (TCB) for summary judgment, of

intervenor Richard Ellenberg, (Trustee), Trustee in bankruptcy of Rodger & Rodger, Inc. (R&R) for summary judgment, and of T&B and Trustee for sanctions against defendant United States (US). The court held a hearing on April 30, 1985 with counsel for all parties present. Upon review, the court grants the motions of T&B and Trustee for sanctions against the US, and denies the motions of T&B and TCB for summary judgment. The court grants Trustee's motion for summary judgment solely as to its finding that the funds in question are part of R&R's estate in bankruptcy. The court returns this action to the United States Bankruptcy Court for the Northern District of Georgia, for further proceedings.

The following facts are not disputed. T&B entered into a contract with the City of Atlanta to build a water treatment project. The contract required a certain amount of minority participation. T&B

entered into a subcontract and working agreement (agreement) with R&R, a minority enterprise. Under these documents, R&R was to perform certain labor and to supply equipment. The agreement provided that T&B would purchase and pay for equipment mentioned in item 3, in R&R's name, and would open a bank account in R&R's name to pay for the equipment. T&B would maintain control of the account which would be set up as a joint signature account by T&B and R&R. (Agreement at 2, Ex. A to T&B's Amended Complaint). The agreement also stated that payment for Item 3 would consist of payments deposited in the account established for equipment purchases. (Id. at 3).

Mike Samford, T&B's Treasurer, contacted TCB to set up the account specified in the agreement. He opened it in R&R's name. The business Account Information Sheet listed the exact title of

account as "Rodgers and Rodgers, Inc.," and the mailing address as "c/o T&B Scottdale Contractors, Inc." It also indicated that the account was opened by "Mike Samford - T&B Scottdale Contractors, Inc." (Ex. A to Affidavit of Edna Wynn, attached to TCB's MSJ). The Corporation Certificate of Authority, completed in R&R's name by an R&R employee, listed Alex Rodger as Chief Executive Officer (CEO), Lillie Rodger as Vice President (VP), M.L. Samford as Project Manager (PM); and Dudley Samford, Jr. as Assistant Project Manager (APM). The certificate also specified that two signatures were required for all checks--the CEO and PM, the CEO and APM, the VP and PM, or the VP and APM. (Ex. B to Wynn's Affidavit). The signature card was signed by all four persons, as "duly qualified and acting officials" of R&R (Ex. C to Wynn's Affidavit). On the back, the card stated that the General Account

Agreement was incorporated by reference. The back of the card was not signed or initialed. Before this account was opened, both T&B and R&R had had accounts with TCB.

In the autumn of 1983, approximately $135,264.89 was in the account. On October 7, 1983 and November 8, 1983, the IRS served notices of levy on TCB for these funds. Later, pursuant to court order, TCB placed these funds, which had been in the account opened by Mike Samford in R&R's name, into the court's registry. On November 7, 1983, R&R defaulted on its contract. On November 17, 1983, R&R filed bankruptcy under Chapter 11, which later was converted to Chapter 7.

T&B filed this action against the US to enjoin enforcement of the levies under 26 U.S.C. section 7426. TCB and R&R moved to intervene. The US filed a complaint in the bankruptcy proceeding for determination of R&R's interest in the funds. On March 5,

1984, at the request of all the parties, this court directed that the US's complaint be withdrawn from the bankruptcy court, assigned to this court, and consolidated with T&B's lawsuit. The court also granted the motions of TCB and R&R to intervene. Later, the Trustee was substituted for R&R.

The court first will consider the motions of T&B and Trustee for sanctions. Both T&B and Trustee served interrogatories and requests to produce on the US; the latter did not respond. They filed motions to compel, which the court granted on November 27, 1984. The US still did not respond, and T&B and Trustee moved for sanctions.

At the recent hearing, Mr. Roger Moore, counsel for the US, admitted that he was dilatory in failing to respond. His only explanation was that he was too busy. Although sympathetic to the long hours and hard work which are lawyer's lot, the court

cannot allow these factors to excuse compliance with its orders. Five months have passed since the court granted the motions to compel, and the US has made no effort to obey. The court therefore grants the motions of T&B and Trustee for sanctions against the US. Mr. Moore is ordered to pay personally the attorney's fees spent by T&B and Trustee is pursuing this matter, in the amount of $300.00.

T&B, TCB, and the Trustee have moved for summary judgment. Typical of its behavior throughout this action, the US has been quiescent. The ultimate question in this action is whether the account is within R&R's estate. If it is, the funds should be turned over to the Trustee and the matter returned to the bankruptcy court which is uniquely qualified to determine the money's distribution. If the account is not within R&R's estate, the court would retain the action to determine the efficacy

of T&B's and TCB's claims. In the latter scenario, fact issues would be involved, and thus summary judgment would not be suitable.

T&B argues that it owns the money in the account. It claims that the agreement indicated that the account was set up solely to pay for equipment, that T&B had control, and that R&R's only interest was to co-sign and see that vendors were paid. T&B also assets that the funds were in constructive trust for its benefit, or alternatively, that it was in the position of a surety. The Trustee maintains that the account is in R&R's name, and that the agreement indicted only that T&B would control, but not own, the funds. Additionally, T&B made no showing that the fund is a constructive trust. If anything, it apparently is a trust for R&R's benefit. The Trustee also notes that T&B presented

no evidence that it paid R&R's debts, what these debts were, how much it paid, and to whose rights it allegedly is subrogated.

The court has reviewed the exhibits, and finds that the account is part of the estate. Section 541 of the Bankruptcy Code provides that the debtor's estate consists inter alia of "all legal or equitable interests of the debtor in property [wherever located] as of the commencement of the case." 11 U.S.C. section 541(a)(1). The intent of this provision is to include an extremely broad range of property, tangible and intangible, within the debtor's estate. Georgia Pacific Corp., v. Sigma Serv. Corp., 712 F.2d 962, 966 (5th Cir. 1983) (citing 4 Collier on Bankruptcy. section 541.02 at 541-5 (1985) (Collier)). In that way, property could be disbursed to creditors in accordance with bankruptcy principles, such as equitable distribution of assets. Obviously, section 541 cannot

expand a debtor's rights beyond those existing when the bankruptcy petition was filed, Collier, at 541-6. The section also does not apply to property held by the debtor in trust for another. Id. at 541-7. The estate, however, generally will hold such property subject to the beneficiary's interest. Sigma, 712 F.2d at 968.

In the instant action, the funds were deposited in an account in R&R's name. The Samfords were listed on the signature card as officials of R&R. One of the Samfords and one of the Rodgers had to sign each check. To all appearances, R&R owned the account and the monies therein.

T&B argues that it owns the funds, notwithstanding that the account is listed in R&R's name.[12] The agreement, T&B

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12. T&B argues that TCB had knowledge of the account's alleged nature. The court does not discuss this issue because it is not relevant to a determination of whether the funds are the estate's property.

contends, clearly indicated that it owns the funds. T&B cites the following language:

> With respect to Item 3 above, Contractor shall purchase and pay for equipment in Subcontractor's name in accordance with terms and conditions dictated by Contractor. Contractor shall open a bank account in Subcontractor's name for the sole purpose of paying for equipment covered by Item 3 above. Contractor shall maintain control of such bank account but account shall be set up joint signature [sic] by Contractor and Subcontractor.

(Agreement, at 2).

This language, however, does not purport to vest ownership of any monies solely in T&B. It merely states that T&B shall maintain control of the account. Even so, R&R also could exercise some control over the account. The agreement required two signatures; one Samford and one Rodger had to sign checks.

T&B's own assertions bear out that R&R exercised some control over the account. Mike Samford stated in his affidavit that

he called TCB after he heard that the IRS planned to levy on the accounts. He told Tom Miller that T & B owned the money and asked him to transfer the funds to T&B's account. Miller complied, but later transferred the funds back because R&R objected. (Affidavit of Michael L. Samford, at 6-7; attached to T&B's motion for summary judgment.)

Additionally, the agreement provided that "[p]ayment for Item 3 shall consist solely of payments deposited in account established for equipment purchases as described above." (Agreement, at 3). By its terms, therefore, the agreement stated that the monies in the account were payment to R&R for equipment. R&R was the subcontractor, who contracted to perform services and buy materials for the project. T&B paid R&R, who paid the vendors. The agreement indicated that R&R had an

interest in the account. Thus, that interest becomes part of R&R's estate. Sigma, 712 F.2d at 964, 968.[13]

The court also disagrees with T&B's contention that the account is in the nature of a trust fund, with R&R as trustee and T&B as beneficiary. One claiming a trust arrangement in its favor must prove its existence. Id. at 969. Certainly nothing in the agreement or account documents explicitly or implicitly suggests this arrangement. The agreement contemplated that T&B would pay R&R money for equipment and R&R would pay vendors. One Samford and one Rodgers [sic] had to sign each check, apparently to insure that the vendors would be paid. The account

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13. T&B could have set up an account in its name, with checks payable to R&R and the vendor. Until the checks were paid to R&R and the vendor, T&B clearly would hold the funds free from R&R's interest. T&B chose not to do so, however. Instead, it set up an account in R&R's name over which R&R had some control.

documents merely show that R&R owned the account, and that the Samfords were listed as officials of R&R who had to sign each check. No indication is present of the parties' intent for R&R to hold the funds for T&B's use and benefit. In fact, the evidence suggests that T&B held the money in trust for R&R to make payments; thus R&R would have the beneficial interest.

The circumstances also do not fit the traditional manifestations of a constructive trust. No allegations were made that R&R wrongfully used the funds, that the monies were paid by mistake, or that some statute impressed a trust. Sigma, 712 F.2d at 967 n. 4. Even if a constructive trust exists, the court could hold that the funds are part of the estate. Id. at 968. The trustee then could pay any funds subject to a constructive trust to

the beneficial owners. Id. The evidence, however, does not point to creation of a constructive trust.

T&B also asserts that it is in a surety's position, and thus has a superior right to the funds. Some authority exists that funds subject to a surety's claim do not form a part of the debtor's estate. Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962). The opinion in Pearlman, however, was authored prior to the 1978 Bankruptcy Code, which widened the estate's net to cover all of the debtor's interest in property. Additionally, in Pearlman, as in other cases cited by T&B, the surety and principal had a contract, and surety bonds were executed. Notwithstanding this issue, the evidence does not indicate that T&B acted as surety for R&R, or that it would be subrogated to any creditor's rights. First, T&B and R&R had no written surety agreement or contract. Second, apparently

no oral surety agreement existed. Dudley Samford claims in his affidavit that because R&R defaulted, T&B stepped in as the general contractor, "in essence as surety," and paid vendors of equipment who were to be paid from the account. (Affidavit of Dudley Samford, at 4). Although the form of surety contract is immaterial, O.C.G.A. section 10-7-4, no evidence was presented that T&B and R&R had any kind of agreement regarding suretyship.

Additionally, T&B claims equitable subrogation, in that it allegedly paid R&R's debts. Again, T&B presented no evidence as to how much it paid, to which vendors, and when. T&B did not show to whose rights against R&R it was subrogated, whether that entity had made any claims against R&R to which it could be subrogated, and whether any such claim would be superior to the other claims against the funds. Dudley Samford's mere

-bald statements in his affidavit do not create a fact question as to the surety/subrogation issue. The evidence before the court indicates that T&B is at most a creditor of R&R, and thus should be required to participate in the distribution of assets with other creditors.

Thus, the undisputed facts show that the funds are property of the estate, Sigma, 712 F.2d at 968. Even if T&B has some interest in the money, which the court does not decide today, R&R has legal title to the account. Additionally, the documents and circumstances indicate that R&R has title and an interest in the monies, the court will turn the funds over to the Trustee, and allow the bankruptcy court to determine the full extent of the parties' interests. Id.

The court grants the motions of T&B and the Trustee for sanctions against the US in the amount of $300.00, to be paid by

Roger Moore. The court denies that motions of T&B and TCB for summary judgment. The court further grants the Trustee's motion for summary judgment only insofar as the court finds today that the funds in the account are part of R&R's estate in bankruptcy. The court further orders that the money deposited in this court's registry be paid to the Trustee as part of R&R's estate, and that this action be returned to the bankruptcy court for its determination of the parties' interests, and distribution of the estate's assets.

IT IS SO ORDERED this 28th day of May, 1985.

/s/_____
WILLIAM C. O'KELLEY
United States District Judge